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Blitzing the Fine Print: What College Football Coach Firings Reveal About Executive Severance

SPEAKERS

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In this episode of *Hiring to Firing*, hosts Tracey Diamond and Emily Schifter are joined by Josh Gelfand, Troutman Pepper Locke partner from the firm's Employee Benefits and Executive Compensation practice group, to break down the nuts and bolts of executive employment agreements through the lens of high-profile college football coach departures. Using real-world examples — including Jimbo Fisher's record-breaking $76 million buyout from Texas A&M, Mel Tucker's for-cause termination at Michigan State following misconduct allegations, and LSU's ultimately unsuccessful attempt to fire Brian Kelly for cause — the conversation unpacks how provisions like termination for cause, good reason resignations, severance structures, and equity arrangements play out when the stakes are highest. Tune in to gain practical insights into how these contract terms are negotiated, drafted, and disputed, and what lessons everyday executive agreements can draw from the headlines.

Transcript

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Hosts: Emily Schifter and Tracey Diamond
Guest: Josh Gelfand
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Emily Schifter (00:08):
Welcome to *Hiring to Firing*, the podcast. I'm Emily Schifter and I'm here with my partner and co-host, Tracey Diamond. Together we tackle all employment issues from hiring to firing.

Tracey Diamond (00:18):
Today we are joined by our partner, Josh Gelfand, who practices in our employee benefits and executive compensation group and sits in our New York office to discuss the nuts and bolts of and some strategic considerations related to employment agreements. We're taking inspiration today from recent headlines covering departures of certain college football coaches and there's sometimes eye-popping severance payments as well as the disputes that followed. Welcome, Josh, and thanks so much for joining us. Why don't we start by having you tell us a little bit more about your practice?

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Josh Gelfand (00:50):
Well, thank you very much, Emily and Tracy. I'm happy to be here. I'm looking forward to this. As you said, I'm a partner in the executive compensation practice in New York. I also head up our private equity M&A subgroup within the exec comp practice. Within that, I do a whole bunch of work on mergers and acquisitions on the exec comp pieces and inevitably on counseling and advising on employment agreements, severance and equity arrangements and things of the like. So this is very much apropos of the topic at hand. So I'm looking forward to speaking with you all.

Emily Schifter (01:24):
Yeah, I know we've worked together on many unemployment agreement and you're truly an expert in all the thorny issues that come up. So perfect guest for this topic for sure. So I sit in Atlanta as our listeners may know where college football for better or worse is big news 365 days a year. But even our listeners who are located elsewhere may be familiar with some of the bigger contract buyouts that have made headlines with some of the big head football coaches in recent years. And there's lots of examples. We just picked a few at random. We'll start with one big example, Jimbo Fisher, who in November 2023 was fired as the head football coach at Texas A&M, which was a decision that triggered a record breaking buyout of over $76 million, which was then the largest in college football history. So the school announced its decision, which it made after six years of Fisher being in the head coach role, following what it considered to be a disappointing season with A&M not in the championship conversation.

Ironically, the day before his termination was announced, Coach Fisher had led the team to a 51 to 10 victory against Mississippi State decisive. So let's listen in to a clip from the reporter who broke the story about his termination describing what was at stake.

Host (02:38):
And this is a very large amount of money. Obviously the $76 million is what gets the headlines, but you have to buy out the rest of the staff. You may have to pay a buyout for the next coach. 25% of this is due within 60 days, the buyout. So that's 19 something million dollars. You're probably talking need like 25 to 30 million in cash right now. That is a huge decision for the Board of Regents for the athletic department administration. How did they come to that decision?

Reporter (03:09):
Oh, I think there's levels here. There's the board, there's athletic director/president. Here at A&M, it's unique to the 12th man foundation because they're the fundraising arm. So I think there were probably a lot of conversations and then maybe Thursday was that one conversation where everybody at once was brought together and involved in it. So not an easy decision to come to.

Emily Schifter (03:39):
Obviously $76 million is more than the average severance payout that we see, but some contract provisions that resulted in this payout are not all that different from the types of provisions that we see in employment agreements between executives and their companies every day, whether as just a part of employment or in the M&A context. So Josh, starting at a high level, what do you typically see live in an employment agreement?

Josh Gelfand (04:00):

Yeah, so it's a good question. The way that employment agreements are typically structured, they serve really three purposes, I would say. So the first purpose is to set out the general terms and conditions of the employment arrangements. So think salary, base compensation, your bonus entitlement to the extent that the person is entitled to one. Typically that is framed as a percentage of the base salary, any type of equity or other long-term incentive arrangement. So think of stock options, restricted stock, profits, interest, whatever it might be. Often it's not tied down very closely or very specifically in the employment agreement, but there can be a description of what will be given or the general broad brush strokes. Beyond that, employee benefit entitlements, again, very general duties, title, work location, things of that nature. And then you get into really the main two important items in there, which is the severance, which is important to the employee and the restrictive covenants, which is important to the employer.

And all those different arrangements tie together hand in hand. So for example, the severance is often and typically is payable only on certain qualifying terminations of employment. So think termination without cause, cause being a term of art, meaning really it'll be defined in the agreement and list out bad actor provisions. So if you commit a felony, if you embezzle money from the company, if you regularly refuse to adhere to the policies and procedures and instructions, things of that nature. So you'd forfeit it, you'd usually get severance if the company terminates you other than for cause. The other way is often there's a concept of what's called good reason. Good reason is the corollary without cause termination. You could think of that as constructive receipt. So good reason, and this is how it ties back to the other provisions. It often relates and says, "Well, here's your salary, here's your title, here are your duties." If we diminish those things in a material way, if you were the CEO and now you're the janitor, we haven't fired you, but your office is now a broom closet 67 miles away and somehow if you decide to quit, that's on you.

Well, now the good reason concept says you can trigger severance entitlements even by resigning if you're resigning for good reason. So those are the two main things. And then on the restrictive covenants, oftentimes these live in the employment agreement, there's a few other places they might be, but here this is what the company is very interested in. We're going to be bringing on this major hire. We're going to be paying a lot of money. We're agreeing to the severance entitlement. We need to make sure this person is going to be tied up and they're not going to use whatever they learn from us to go disclose it to other people to go compete with our competitors or to solicit our employees or customers. And so building those components are, I think you could think about like the three legs of a stool that fit on the employment agreement side.

Tracey Diamond (07:11):
Josh, you mentioned various forms of equity or types of equity, stock options, RSUs and profit interest. I think you might've even mentioned a fourth one. Can you break that down for us a little bit and explain to our listeners what the differences are between them?

Josh Gelfand (07:25):
Sure, sure. That could be its own podcast probably. Is

Tracey Diamond (07:28):
That a high level?

Josh Gelfand (07:29):

The way to think about it is equity incentive awards in general are long-term incentive arrangements that are tied in and often are actually equity in the company. And the idea there is you're going to align the interest of the employee with those of the shareholders and other owners of the … And so by giving them some form of equity. And so the different types you can get. So let's start with stock options, I think because most people are probably the most familiar with those. A stock option is a contractual entitlement to buy shares of a company at a set price and the idea is that you're essentially getting to buy them at a discount of the future value. So when you get a stock option, for various reasons, it has to be priced almost always at no less than the underlying fair market value of the shares covered by the option.

The strike price is set at today's fair market value, but the hope is the value of the company is going to go up and therefore when you eventually decide to exercise your option, you'll be paying the lower price for the more valuable piece of equity. Without getting too in the weeds, the tax treatment of that is there's no tax on grant or on investing of the option, but when you exercise it, that spread, that discount between current fair market value and the exercise price value, that's ordinary income because the IRS says that that discount is really compensation you're getting. And so once you do that, after you go forward, when you eventually sell the shares, if you've held them long enough, you can get long-term capital gains. So that's options.

Restricted stock, which it's not that commonal that does come up, is essentially what it sounds like. I'm giving you stock in the company. It's going to be subject to various vesting contingencies when it can be forfeited. And if you stick around and you hit those vesting contingencies, you'll invest and retain that stock. The tax implications of that are not always great depending on the situation of the company because you're getting an actual piece of property and you're either going to get taxed on the value of that property when it vests or if you make what's called the section 83B election, which is essentially an election of the code to taking the income the amount earlier. So you say, "I'm going to get taxed when I'm granted the award, not when it invests." But in either case, you're going to have to pay ordinary income tax on the value of the award.

So a lot of times that's not ideal and there's ways to structure. We don't have to get into it here, but there's waste to structure, but it's not ideal because you're going to get a tax charge that you may not have liquidity or the desire to pay for at the time. The other two, I would say that it's important to highlight that have come up a lot are what we call restricted stock units, RSUs, those are actually not equity, it's equity based comp. So RSUs are just a contractual arrangement that says, "We will pay you in the future either shares or cash," and sometimes it can specify one or the other based on various vesting and other contingencies. So again, there on the eventual vesting and grant are non-issues from a tax perspective, one is an issue for the most part, there's some caveats to that, but for the most part, the key issue is when you are settled, when the award is paid, that's going to be ordinary income because really you just have a contractual compensation arrangement and you have to also get into compliance or exemption there from what's called section 409A of the tax code.

That's the section that governs non-qualified deferred compensation, which is a long way of saying something that is vested or earned in one year but could be paid in a subsequent tax year. So if you've got that kind of arrangement, you're going to have to comply with all these very arcane regulations and restrictions around payments. Often with RSUs, people try to make them structure in a way to get out of foreign IA by saying, "Well, you never really vest or when you vest, we're going to pay you shortly after you vest and that way you kind of mitigate that risk." And then the last one as you noted is profits interests. So profits interests are an ownership interest in a partnership or an LLC taxes partnership and there those are pass through entities. And the way this works is there's a special setup in the tax rules that say that if you are getting a partnership interest in exchange for services you're rendering to the partnership and are you're only entitled to share in a future appreciation.

So thinking almost like a stock option where you get the exercise price, you have to pay that. So you're really only getting the gain above that. So profits interest is similar in that concept and if you set it up that you only get future appreciation and there's a few other requirements, then you can get the very beneficial tax treatment of the partnership of the profits interest, which is that on grant investing are both not issues from a tax perspective. And if you hold it long enough that any distributions to the extent they're otherwise eligible for capital gains treatment will get it. So those are very favorable. A lot of companies like to use those instruments because they can provide a very tax efficient way for employees to get equity comp. The caveat on that, which I'm sure you guys have dealt with or thought about before is you get into this issue where depending on the structure of the entity, if you give someone a partnership interest, they might actually flip to no longer being treated as an employee, but rather as a partner, which comes with a whole other slew of complications.

There are ways to structure around that, but those are the main broad broadstrokes types of equity that you would deal with or often see.

Tracey Diamond (13:20):
So if our listeners got nothing else out of that, they now know that executive compensation attorneys are tax attorneys in disguise.

Josh Gelfand (13:28):
It's a big intimate parties.

Tracey Diamond (13:29):
Yeah. A lot of complicated tax implications from all the various forms of equity, but also a lot of good financial incentives to provide equity to folks.

Emily Schifter (13:38):
Yeah. I was going to say, give the complications, why would you do this? But there's obviously a lot of incentive to having people stick around, incentivizing their performance and company performance, all of those things. I'm sure you see lots of reasons for why companies might try to structure their compensation that way other than just a bonus.

Josh Gelfand (13:53):
Yeah. Definitely.

Tracey Diamond (13:54):
Let's take a step back though and think more on a more basic level, leaving aside equity, why would a company give a certain employee or an executive an agreement as opposed to just sort of an offer letter that they would give a rank and file employee?

Josh Gelfand (14:09):
So it's a great question and they don't always do it. It really is case by case. The reason why it's often given for

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senior folks is because in the market, in order to attract executives, the company needs to provide them oftentimes with some level of comfort and security around the hire. And so part of that from their perspective is going to be, well, no, I need to know what my arrangement is. I want to have in writing what my base comp is, oftentimes what my term of employment is, which can be all the way from some fixed term or it could more often than not though it's usually an indefinite or restarting term that kind of keeps rolling. And they're going to want to know that they're going to have a severance entitlement of some level that gives them runway that if this doesn't work out, whatever risk they're taking by moving to this new job, they're going to still have some protections.

And on the flip side, it's very important for the company that they want to put in place restrictive covenants. And so the employment agreement is really the place that those would live. Now you can call it an employment agreement, you call it an offer letter. If it's got these trappings, it's going to be getting you to the same place. When I think of an offer letter, generally it's really going to be a couple of one or two page, almost non-binding, just giving you the terms of your employment, which I think is what most employees across the board have. In the United States, it's primarily senior executives for which employment agreements are reserved.

Tracey Diamond (15:36):
Do you see any benefit in including restrictive covenants in the employment agreement versus having it in its own separate agreement, just a restrictive covenant agreement?

Josh Gelfand (15:45):
I think it really depends. I see it both ways. Oftentimes you'll have multiple layers of restrictive covenants in various agreements. You might have an equity agreement that goes along with this where they've got their own separate set of restrictive covenants on top of the ones that are in the employment agreement. As I'm sure you guys deal with all the time and headaches around conflicting terms or if you've got multiple layers of covenants, which one controls? Do they all control? But I think that at the end of the day, the only reason that I could think of where it would tie in is maybe to adress the consideration for purposes of enforceability of the covenants, but usually it's crafted in such a way that it's tied to employment, either commencement of employment or ongoing employment. And so whether you put it in the employment agreement or it lives in its own standalone agreement, I think you're going to get to the same place.

Tracey Diamond (16:36):
Yeah. I mean, for me, I see one benefit would be if you have concerns about enforceability and you're in a state where a court might not be willing to blue pencil an agreement if the restriction is overbroad. If you don't have good severability clause, let's say it could potentially invalidate the whole agreement, which I'd rather invalidate the restrictive covenant agreement than the whole employment agreement, or maybe not, but I think it's something to think about, right?

Josh Gelfand (16:58):
That's fair. That's fair. I think the other, maybe more of a pragmatic approach is also, like I said, employment agreements are typically reserved for senior executives, but you may want to have a standard non-disclosure IP assignment, whatever it is agreement that you give to everybody. And so if you have it as a standalone, it might be a little easier pragmatically to just give that to people as part of their onboarding package.

Tracey Diamond (17:21):

That's a good point. And it's also a good time to remind our listeners who are drafting these agreements that we need to know your state laws when it comes to restricted covenant agreements. Some states allow for continuing employment as consideration or even the start of employment and some don't.

Josh Gelfand (17:36):
That's right, all you guys.

Emily Schifter (17:37):
We're a good team. So you've mentioned the concepts of cause and good reason and how those definitions kind of play together and impact what's in the rest of the agreement. And I know we often see these get very hotly negotiated. So what are the kind of differences that you see and how these terms are defined and even if they're both included at all?

Josh Gelfand (17:54):
Sure, sure. So I think that to start with, I'll say cause is almost always included because even if there's a severance component to the agreement, there's always going to be a cause concept because they're always going to be a place where you say, "Well, I'm not going to pay you severance if you've done this." And so if there's severance, there will always be a cause definition or almost always. Good reason varies a bit more. I think that more often than not, there is a defined good reason concept in there, but you don't always get it and then it ends up being question of negotiating leverage a lot of times. But those are the two primary ones. And you're right, they do oftentimes get heavily negotiated. The reason is because a lot of the economics around an agreement and compensation will be tied to these, not just because it goes to severance, but when you relate it back to the equity entitlements, particularly the incentive equity, oftentimes anything you have is forfeited without consideration upon a termination for cause.

And so the cause definition is going to be really important because it's not only am I not going to get severance, it's I might lose all of my incentive equity and if I have purchased equity in an arrangement, you might also either lose that or more often it'll say you'll get bought out at costs, right? It's a very important piece of the puzzle in terms of a negotiation and setting up the arrangements

Tracey Diamond (19:16):
And hotly litigated on the backend if company decides to exercise their termination with cause option.

Josh Gelfand (19:23):
Oh, for sure, for sure. Coming from a transaction perspective, we always try to say, "No, let's just find the mutually agreed separation and move on." Can't share this. I've stories of some pretty bad actors who have still negotiated a mutual exit as opposed to a termination for cause.

Emily Schifter (19:40):
It's all negotiable. All

Josh Gelfand (19:41):
Negotiable.

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Tracey Diamond (19:43):
All right. Well, that leads us to our next clip. In September 2023, Michigan State University announced that it had terminated its head football coach, Mel Tucker for cause, claiming that he engaged in moral turpitude that brought public disrespect, contempt, and ridicule on the university. The termination resulted from allegations that Tucker sexually harassed Brenda Tracy, nice name, sexual assault prevention advocate who had been hired by the university to educate the team about sexual assault. The whole story here is just so ironic, right? Tucker denied Tracy's allegations contending that the relationship was consensual. At the time, Tucker was two years into a 10-year $90 million contract extension. Let's listen in.

Reporter (20:31):
Breaking news here on CBS Sports HQ from college football, Michigan State has fired head football coach Mel Tucker following sexual harassment allegations that ultimately led to his suspension earlier this month. In a statement, the university's athletic director said Tucker's "inappropriate and unprofessional conduct" led to the decision while adding the school would distance itself from Tucker based on his actions. Tucker is accused of engaging in explicit acts with sexual assault survivor and activist Brenda Tracy who filed a complaint last December. The firing comes two years into a 10 year $95 million extension that Tucker was given back in 2021. In terms of the statement issued by the university, here it is or part of it anyways, the university terminated Tucker's contract for his admitted and undisputed behaviors, which have brought public disrespect, contempt, and ridicule upon the university and constitute a material breach of his agreement with moral turpitude

Tracey Diamond (21:32):
At the time of his termination, Tucker had more than $79 million remaining on his contract and by terminating him for cause, the school claimed it was not required to pay out any of the remainder.

Emily Schifter (21:43):
So this is exactly the kind of dispute that we were just talking about that you mentioned, Josh. So in terms of logistics, what happened here is the university sent a written notice of intent to terminate for cause and it asked for a response, I think within seven days. So Tucker went out, found an attorney and responded via that attorney in a super long, I think it was more than 25 pages long. I read in some reports his response disputing all the reasons that the university had said said no cause to terminate me and I disagree, but the university proceeded anyway and then of course he sued them. And I think that lawsuit is still ongoing and it was one of four different lawsuits related to his termination and the alleged harassment and I think two between Mel Tucker and Ms. Tracy herself. So lots to unpack here, lots of disputes going on here and the numbers are a bit bigger I think than what we often see, but some of the facts I think have application to any executive departure.

So Josh, do you see any lessons here on how these contract disputes can play out in those less public everyday scenarios?

Josh Gelfand (22:44):
Yeah. I think the idea that the university gets to terminate the contract in a way that means he forfeits the rest of the contractual pay and severance is really a big point in how they decided how it's … This kind of goes to what we were talking about before though in terms of sometimes you have a cause concept, but do you really want to pursue it? Do you really want to go into that? And in this case, there are times when you want to and you need to. And I think that it ties in, interestingly, we were talking before about kind of what goes into the definition of cause

and some of these items that they touch on in the issues that you just discussed are ones that are very common and very typical. So we said fraud, felony, convictions, things like that, but there's oftentimes specifically failure or a breach of company policies and that would include sexual harassment policies.

It would include other conduct policies. Oftentimes, or sometimes it's even specifically called out around sexual harassment. And so you have those types of situations, moral turpitude clauses, meaning you've done something that's basically considered unethical or wrong. Those types of items are typically built into uncovered in a cause definition specifically so you have that type of arrangement. One of the issues that comes up once in a while or it comes up often when we discuss it is convictions of felonies, convictions of dishonest misdemeanors are often covered. A lot of times companies will also want to include indictments in that. That can sometimes be a fight and you don't always get that. It depends on the negotiation. But the idea being if you can be indicted for something, it might take a long time before you're prosecuted or before you're found guilty, but that could still have major adverse implications for the company.

So I'll give one good example. I was representing a client and what they were doing is they worked in the investment management space and some senior executive was indicted for fraud and they hadn't been convicted yet, but you have to say, "Well, listen, indictment was in the cost definition, but we need to have this because we don't want to be in a situation where people who are going out there marketing people to trust us with their money when we've got a senior executive who has been indicted is on the front page of the paper for stealing money." So those are situations where the companies will want to protect themselves for that. And on the flip side, the employee might want to say, "Well, no, I need protection because I can be indicted for anything. It doesn't mean that I did it. I can be found innocent." So that's where the negotiation comes in sometimes on those types of arrangements, but those are all major issues that can flow into public life that can get into the newspapers.

And so those are areas where companies will be very sensitive and want to protect themselves and where they will try to find as much insulation as they can to get ahead of a problem and make sure that they've got the leverage they need on those types of severance and other equity arrangements because you don't want someone sitting on your equity table if they are indicted for fraud or sexual harassment.

Tracey Diamond (25:54):
So how specific do those facts have to be to support the for-cause trepidation?

Josh Gelfand (25:58):
So it really depends. You guys probably have better visibility into the litigation piece of it. But what I will say though is it's fact and circumstances dependent. Most companies don't want to terminate someone for cause because doing so can raise reputational issues for them as well as headaches because inevitably it will lead to litigation. They will hesitate. So usually when they get to that point, it's because it's a clear cut case and they really don't feel comfortable providing some type of a negotiated exit. One place where there is some area for adjustment on there is sometimes you see in the definition of cause, it'll just say cause means if any of these things happen. Sometimes it'll say, "Cause means if the board determines that this stuff has happened." And so if you get to that type of a structure, a court I would expect would have more deference toward a determination of the board because the question isn't, did it or did it not occur, but it's did the board make this determination in good faith?

Was the board reasonable in the determination it made? And so there's an area where you get some additional flexibility, which is why that also becomes oftentimes a negotiated point where executive council will push against it for obvious reasons and company council will push forward for obvious reasons.

Emily Schifter (27:19):
Yeah. And a good reminder that sometimes your boilerplate language needs to be dusted off because it doesn't always say what you think it says.

Josh Gelfand (27:25):
For sure, for sure. So I

Emily Schifter (27:26):
Think that brings us to our final coach. In 2025, Louisiana State University sought to fire its former head football coach, Brian Kelly for cause to avoid paying the nearly $54 million buyout in his contract. In a nutshell, the university started out by saying it was going to fire him after LSU lost to Texas A&M, but a termination without cause would have entitled him to this 54 million payment. And the university then tried to claim that they actually didn't intend to fire for performance, but in fact wanted to terminate for cause and tried to cite all sorts of behaviors and purported misconduct that he had engaged in that would allow them to do that. So let's listen in to what Brian Kelly said about the facts here.

Brian Kelly (28:07):
Well, if you ask LSU, I was playing 350 rounds off the fear and drinking in my office. The thing they didn't know is I have a torn left rotator cuff that I suffered in the Florida game on the sideline. I got hit by an offensive defensive lineman and it tore my rotator cuff. So I haven't played much golf. I've been rehabbing mostly.

Emily Schifter (28:31):
Kelly's argument was that he didn't do any of the things he was being accused of and that really LSU just wanted him to win more games, which is obviously a performance issue if you are a college football coach, but not one that he thought was actually covered by the agreement's definition of cause. So he sued and after attempts to settle for a lesser amount failed, ultimately the university agreed that it was in fact a termination without cause, meaning that he was going to get his full buyout. Let's listen to one commentator describe it.

Commentator (28:59):
If you're trying to build a case for a for cause firing, you're going to look at every possibility and sometimes those things become very common talking points among fans, media, boosters, whatever. And that's clearly stuff that started to snowball and started to get out there. And he pretty summarily, I think, stamped that out. Listen, we can all agree he didn't win enough, right? He didn't win enough. It's still stunning that they were up 18 to 14 at the half against Texas A&M and after 30 minutes of football, he's fired, that it went the way it did, that they were preseason top 10B Clemson and it went the way it did, that at the end of October he was fired. But Brian Keller wasn't fired because he played too much golf or because he was drinking in his office or anything else. He was fired because they were losing and people in influential spots were ready for a change

Emily Schifter (29:54):
And it's amazing how many college football commentators and podcasts there are out there. You would not think there is this much to discuss

Tracey Diamond (30:01):
So much to discuss. Yeah.

Emily Schifter (30:02):
That's right.

Tracey Diamond (30:04):
As you mentioned, Josh, sometimes an employment relationship ends and there isn't really any grounds for cause or the difficult to prove challenging and proving cause, but the company doesn't want to pay the severance. In a situation like this, failing to have a detailed definition of cause or the right facts supporting grounds for cause can lead to very expensive disputes. And as LSU saw when it was trying to recruit Kelly's replacement, it can impact budgets, operations and make it difficult to recruit the next hire. So what are some of the most common drafting mistakes that you see in drafting definitions of cause and resignation for good reason in employment agreements?

Josh Gelfand (30:42):
I wouldn't necessarily call them drafting mistakes, but I think there are some areas where there's ambiguity oftentimes, even though it's market practice to draft it in these ways, but if it was ever litigated, it could lead to some complications. So there's oftentimes qualifier thresholds on a lot of the definitions. It's only this if it's a material impact. Did it create reputational harm for the company? Things of that nature. And then those are areas where because of when you're negotiating it on the front end and from the transactional perspective, we're trying to get a deal done. We're trying to get someone onboarded and we all kind of agree, okay, this needs to be material. We're not going to trigger cause if it's an immaterial breach. If you steal a pencil is different than if you steal a hundred million dollars. But I think that when it comes down to actual litigation, I'm sure that the ambiguity of what is material can become something heavily fun of and disputed when you actually get to major dollars at issue.

Similarly, oftentimes you'll provide for a cure period in the cause definition or the good reason definition, meaning whatever the trigger event is, it only counts to the extent that if it's curable and you have cured within that period or you haven't cured it in the period. Well, then you get into the question of what's curable. Should I have given them a cure period on something or is it by definition not curable? Who's deciding that? And was it actually cured? Did the board make a good faith determination or is it disputed? I think those are areas where if there's real money at issue, I'm sure you could see major fights.

Emily Schifter (32:18):
Definitely. And obviously the numbers we're talking about here, as we've said, are much bigger than your average payout, but the concepts are similar to what we might see in other executive agreements. And from what I understand, not all of these payments were due like you're getting paid $54 million today. They're spread out over time. So how is severance typically structured when you're not dealing with something in quite that ballpark?

Josh Gelfand (32:39):
Before we jump to that, I want to mention that the one thing I left out of the prior point on a good reason trigger another issue is oftentimes good reason is triggered by diminution in base salary. Fine, that's kind of straightforward, even if it's material diminution, you can kind of get there. But it also oftentimes includes reduction

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in title, duties, responsibilities and role. And there you get into that same quote, let's say that you were in charge of X, Y, Z and now you're in charge of ABC. Well, is that a change? We changed over, you have different silos, but maybe this one's more prestigious than the last one. And you get into these really gray areas where unless the parties are aligned, you can really get into some complications. So that's just to touch on that too. So in terms of where the market is on severance and the structure, it varies depending on the size of the company, on the base comp of the person and the level of seniority, the executive.

But typically severance falls within three or four categories. So there's base salary severance, which will be for some period of time, call it depending on the facts, it could be anywhere from three months to one year or two years of base salary, either in lump sum or more oftentimes in salary continuation over a period. The reason companies want that is because they don't want to take a giant expense right off the bat and they have to pay out the money. But also if you're paying someone out a million dollars over a year, well then if they breach their covenants, you can just shut off … Or depending on whether you're allowed to under the documents, you can shut off payment. If you've given them the whole money upfront, well, now you got to go and try and get it back from them, which is a lot harder.

So base salary continuation, I'll preface it by saying all this is typically contingent on delivery of a release of claims because that's something you really … If you're going to pay them, you want to get a release for that. That's 99 times out of a hundred, if not more, you're going to see that.

Emily Schifter (34:41):
Definitely.

Josh Gelfand (34:42):
Another piece that's common in there is some level of bonus, whether it's the earned but unpaid bonus for a prior year to the extent it wasn't yet paid as well as some form of typically a pro rata bonus for the current year of termination. Typically, it's either a target level or more often I think I'm seeing, and again, it varies by situation, but based on actual performance, you may have to wait until the end of the performance cycle to know what that will be and then prorate it. And oftentimes there is also some level of medical care continuation coverage. So think COBRA, which they're entitled to by law, but some form of subsidy on the COBRA. So either company paid or the company pays you an amount such that what you're coming out of pocket for is what you would've paid had you been an active employee.

Just to make it clear, so COBRA continuation coverage allows you to continue on the medical plan of the company generally for up to 18 months post termination, but it's charged at 100 and they can actually do, I think, up to 102% of the cost of the coverage. So normally when employees get covered, pay their premiums for healthcare, the employee's not often paying the full premium. Usually there's an employer portion and an employee portion of the premium. So if it's $100 for the premium, the company might be covering 50 and the employee 50. So if you just go on COBRA, you're now as a former employee covering a hundred. So oftentimes they'll say either the company will pay it or the company will subsidize the continuation coverage for the severance period and then you'll only be coming out of pocket for the portion that you would have had you been a continuing employee.

So those are, I think, the main ones. Sometimes in the equity documents, you'll find other treatments of the equity in connection with the qualifying termination. Oftentimes that's negotiated separately, or at least it's separated out in the documents. And so those are the key pieces.

Tracey Diamond (36:44):
So one issue that sometimes gets lost is whether an executive has the right to severance if the agreement expires naturally at the end of its term or in the case of automatic renewals at the end of an extended term. Is this the same thing as termination without cause entitling the executive to severance?

Josh Gelfand (37:02):
So it really depends. If an agreement has a fixed term and doesn't otherwise extend or can be ended at the time, then you're going to want to have in there clarity about what that means because oftentimes if it has a fixed term, you could say either way, you could say, when the term is up, that's it. And through that date, there's no severance, this is just an expiration. Other times you say, if you haven't renewed the agreement, if the company's opting not to extend the term, that's effectively a termination without cause. It'll say that in the agreement that it'll say this triggers severance. You'd want that to be spelled out in the document. If it's not specified, typically I would expect that that would mean that you don't get severance at the end of it because it just says, "Here's a term when the term is up, the protections you have in this agreement are gone." So you want to be very clear about how that … If you want a fixed term in your agreement, you'll want to be clear about the implications either way.

Emily Schifter (37:57):
So Josh, what are the provisions that executives tend to negotiate for the most versus companies?

Josh Gelfand (38:02):
So I think it really depends on the circumstances of the people. One that's oftentimes brought up that is probably the most pragmatic is to say, "Well, who's paying for my lawyer's fees as an executive?" So a lot of times there will be some level of compensation, not always, but some level of compensation where the cost of the executive's lawyer is covered by the company. Again, not always, but that's one. And then if there's really bespoke provision, let's say it's a CEO, they want authority on setting the metrics for the bonuses. Sometimes you'll have a more robust description of what the bonuses are and how that's going to work. Maybe it's an exhibit. If there's any other types of one-offs, special types of bonuses, bespoke arrangements around commuting expenses or travel, airfare, first class flights, things of that, all those types of bespoke things, those will be negotiated, whether they're typical or atypical on an agreement to the extent that they're important to the executive and to the company.

Tracey Diamond (39:02):
Josh, I think that you've made me really wish that I wasn't a lawyer and that I was an executive somewhere and said these contracts sound very rich. Josh, thank you for joining us today and thank you so much to our audience for listening to today's episode. Don't forget to visit our blog hiringtofiring.law and subscribe to the blog so you could get the latest updates. Also, be sure to subscribe to this podcast via anywhere you get your podcasts and don't forget to check out our firm's other podcasts on troutman.com/podcasts. See you next time.

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